Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
The Effect of Foreign Mobile Termination Rates	)	
on U.S. Customers	)	IB Docket No. 04-398
	)	
	)	
	)	

<u>REPLY COMMENTS</u>

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Executive Summary

NII Holdings, Inc. is a mobile service provider based in Virginia with operations in Argentina, Brazil, Chile, Mexico and Peru. Unlike many other mobile service providers, NII Holdings strongly supports regulatory measures to decrease mobile termination rates.

Based on its experiences in Latin America, particularly in Peru, NII Holdings recognizes that market forces alone are unable to bring mobile termination rates to cost-oriented levels. For example, in Peru, where one mobile operator dominates the market, wholesale mobile termination rates are among the highest in the world. Due to the consolidation that has taken place in Latin America, the market is becoming highly concentrated and is largely dominated by two players – Telefónica Móviles and América Móvil.

The issue of high mobile termination rates is one that is going to become increasingly important as the dependence on mobile services continues to grow and the mobile services market becomes increasingly concentrated in Latin America. This issue of mobile termination rates requires oversight and regulation because mobile operators have no incentive to impose any decreases in rates.

The large disparity that exists between the on-net retail rates and wholesale termination rates demonstrate that wholesale termination rates are significantly above-cost and are being used to subsidize the dominant operator's operations. This runs counter to the principle of cost-oriented rates and detrimentally impacts smaller mobile operators, such as NII Holdings.

Given the market concentration in Latin America, particularly in Peru, the leverage exercised by dominant mobile operators, and the negative impact that mobile termination rates are having on smaller mobile operators, U.S. carriers, and U.S. consumers, we encourage the Commission to assist national regulators to act swiftly to implement measures mandating cost-oriented mobile termination rates. In particular, NII Holdings requests that the Commission urgently seek assurances from the Peruvian regulatory authority that: (i) it will impose a provisional wholesale termination rate on all mobile carriers that is more in line with the Latin American regional average of 13-14 U.S. cents while it conducts its mobile termination rate proceeding and (ii) it will meet its June 2005 deadline to develop a cost-oriented mobile termination rate.

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REPLY COMMENTS

NII Holdings, Inc. ("NII Holdings") hereby submits its reply comments in response to the Notice of Inquiry on foreign mobile termination rates (the "NOI") released by the Federal Communications Commission (the "Commission") in the above-captioned proceeding. NII Holdings is a mobile communications services provider based in Virginia with operations in Argentina, Brazil, Chile, Mexico, and Peru.

NII Holdings is a strong proponent of decreasing mobile termination rates. As a small mobile operator in Latin America, NII Holdings and its subsidiaries are subject to exorbitant mobile termination rates that are imposed by larger mobile operators.

NII Holdings' subsidiary, Nextel del Perú, S.A. ("Nextel Peru"), has been advocating for the national regulatory authority, Organismo Supervisor de la Inversión Privada de Telecomunicaciones ("OSIPTEL"), to impose a cost-oriented mobile termination rate in Peru. To date, OSIPTEL has failed to address this problem. The consequence of this inaction – Peru has one of the highest mobile termination rates in the world.

I. Due to Market Concentration, the Latin American Market is Becoming Less Competitive

NII Holdings has been active in Latin America since 1997 and has extensive experience and knowledge of the market. Based on this experience, it disagrees with BellSouth's comments that the Latin American market is growing and competitive.[1] Instead, NII Holdings finds that the market is becoming less competitive, due to the consolidation of mobile operators which leads to market concentration.

About 82% of the Latin American market is currently served by three mobile operators: Telefónica Móviles, América Móvil, and Telecom Italia Mobile.[2] As noted by Table 1 below, the two most dominant operators are Telefónica Móviles and América Móvil. In particular, Telefónica Móviles' market dominance has grown rapidly with its acquisition of BellSouth International Inc.'s operations in ten Latin American markets.[3] In addition, during 2003-2004, America Móviles acquired more than half a dozen mobile operations in the region.[4] Based on end-2003 data, Telefónica Móviles is the largest mobile operator in Latin America, with approximately 40.6 million customers in the region, just above America Móvil's 40.4 million.[5]

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[1] Comments of BellSouth Corp., *In re The Effect of Foreign Mobile Termination Rates on U.S. Customers*, FCC IB Docket No. 05-398, Jan. 14, 2005 at 6 [hereinafter Comments of BellSouth].

[2] *Id.* Telecom Italia Mobile has operations in Argentina, Bolivia, Brazil, Chile, Cuba, Paraguay, Peru, and Venezuela. *See Game on for Concentration*, *available at* Covergencia Latina, http://www.convergencialatina.com/en/mapanota.php?id=62820.

[3] The ten markets are: Argentina, Chile, Colombia, Ecuador, Guatemala, Nicaragua, Panama, Peru, Uruguay, and Venezuela. *See* Comments of BellSouth Corporation, *supra* note 2, at 1.

[4] 2004 Telecoms in Latin America – Overviews and Company Profiles, Global Information Inc., July 2004, *available at* http://www.gii.co.jp/english/pa20941_telecoms_latin_america.html.

[5] Latin America: Telefónica gets BellSouth's numbers, Mar. 12, 2004, ebusinessforum.com, *available at* http://www.ebusinessforum.com/index.asp?doc_id=7015&layout=rich.

Table 1: Competition in Latin American Mobile Services Market (Year End 2004)				
Country	**Number of Providers in Market**	**Telefónica Móviles (% Market Share 2004)**	**América Móvil (% Market Share 2004)**	**Combined % Market Share (2004)**
Argentina	4	45%	24%	69%
Brazil	5*	17% (VIVO[6])	13% (CLARO)	30%
Chile	3	49%	----	49%
Colombia	3	32%	56%	88%
Ecuador	3	32%	65%	97%
El Salvador	4	24%	33%	57%
Guatemala	3	28%	49%	77%
Mexico	5*	13%	78%	91%
Nicaragua	3	36%	64%	100%
Panama	2	48%	----	48%
Peru	3	69%		69%
Uruguay	3	32%	(just entered market)	32%
Venezuela	5	49%	----	49%
*Note: In Brazil and Mexico there are multiple service providers, but we only included the five major providers. **Source: EMC World Cellular Information Service, available at www.emc_database.com				

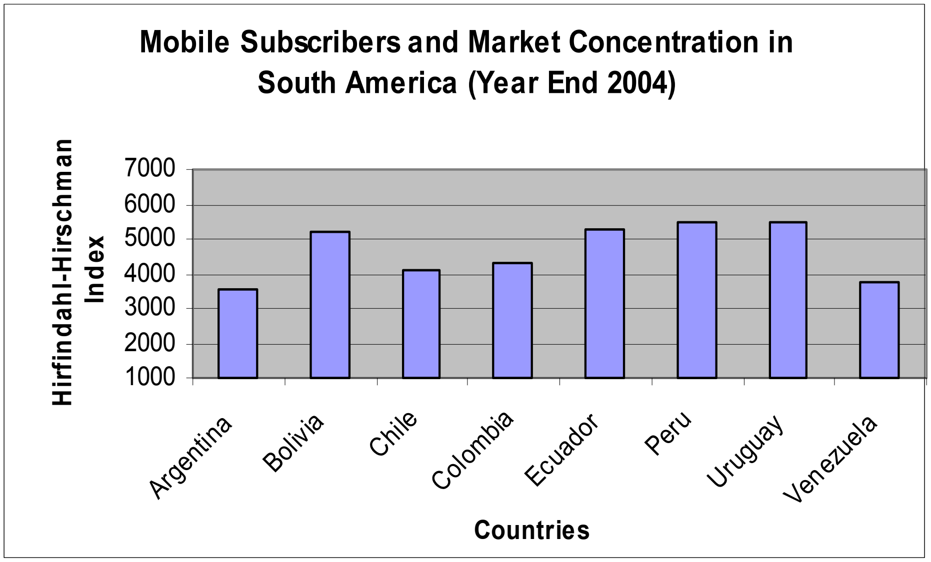
The Herfindahl-Hirschman Index ('HHI') is a commonly accepted measure of market concentration.[7] The HHI ranges from a minimum of close to 0 to a maximum value of 10,000. An HHI over 1,800 indicates a highly concentrated marketplace. In a comparative analysis, a difference of 100 points or more represents a measurable and statistically significant difference in the degree of market power.

Each of the Latin American countries included in Chart 1 below has an HHI of over 3,500, with Peru having one of the highest levels of market concentration in South America with an index of 5,515. Telefónica Móviles' dominance in Peru is reflected in a high degree of concentration and, therefore, a low degree of competition. This type of unchecked market power, reinforced by above-cost termination rates, threatens Nextel Peru's ability to continue to make competitive inroads into the Peruvian market.

[6] Vivo is a joint venture between Telefónica Móviles and Portugal Telecom.

[7] The HHI is determined by squaring the market share of each firm in a market, and then adding up the results. *See* http://www.usdoj.gov/atr/public/testimony/hhi.htm.

Chart 1: Mobile Subscribers and Market Concentration in South America[8]



Notably, two of the markets in which there have been recent increases in mobile termination rates – Colombia and Nicaragua – also have a mobile services market with high concentration.[9] In addition, it is not surprising that the market in which Telefónica Móviles has the largest market share, Peru, is also the country with the highest wholesale termination rate in the region.

II. Market Dynamics Alone Are Not Sufficient to Decrease Mobile Termination Rates

BellSouth states that "[n]egotiations among carriers in a competitive, free-functioning marketplace provide a further control upon mobile termination rates" and that its "negotiations generally resulted in lower rates, because each party had an incentive to

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[8]This chart was prepared using data obtained from the EMC World Cellular Database 2004.

[9] *See* Comments of MCI, *In re The Effect of Mobile Termination Rates on US Customers*, FCC IB Docket No. 04-398, Jan. 14, 2005, at 5.

keep costs as low as possible, to enhance profitability in a competitive market."[10] However, as noted above, given the power of two dominant players, the marketplace cannot provide the necessary controls to ensure that mobile termination rates are cost-oriented. Given similar circumstances of dominance, the European Commission and a number of national regulatory authorities have recently determined that in the absence of countervailing power and competitive alternatives, mobile operators will be classified as "dominant" for call termination on their own network.[11]

BellSouth also states that "[i]n competitive CPP markets, both customer behavior and carrier incentives will act to keep mobile termination rates at reasonable levels."[12] NII Holdings disagrees with this assertion. As noted, the markets under consideration are not highly competitive and further, mobile subscribers respond to retail rates for their mobile calls – not directly to termination rates.

Above-cost termination rates, however, do facilitate a particular type of anti-competitive activity that can be employed to reinforce dominance. Dominant carriers can engage in a "margin squeeze" by charging on-net prices that are below the termination rate charged to competitors. Because a carrier that is dominant in the call origination market by definition has a large market share, a "margin squeeze" makes it very difficult for a competitor to attract new customers or to lure existing customers away from the

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[10] Comments of BellSouth, *supra* note 1, at 8.

[11] *See* Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (*notified under document number* C(2003)497), *available at* http://europa.eu.int/information_society/topics/telecoms/regulatory/publiconsult/documents/relevant_markets/l_11420030508en00450049.pdf

[12] Comments of BellSouth, *supra* note 1, at 6.

dominant carrier unless the competitor can match the retail prices to existing customers (*i.e.*, the on-net prices for the dominant carrier). Matching the retail price, which is below the termination rate, involves incurring an explicit marginal loss on every such call. In this manner, above cost termination rates facilitate the perpetuation of a dominant position. Peru is a perfect example of this situation. Telefónica Móviles has the highest market share in Peru and the highest wholesale termination in the region, with an on-net retail rate as low as 3 U.S. cents per minute while its wholesale termination rate is as high as 25 U.S. cents per minute.

Additionally, NII Holdings agrees with INTUG's comments that mobile operators have an incentive to retain high mobile termination rates in order to make their numbers look better to their shareholders. As noted by INTUG, "MNOs [mobile network operators] are under strong pressure from financial markets to maintain and to increase their ARPUs [average rate per users]. In the continuing absence of new revenues . . ., they have little alternative but to sustain present business practices, notably to rely on the revenues from the termination of call . . ."[13]

For example, Telefónica Móviles provides a significant revenue base for its parent, Telefónica. As noted in the trade press, "[a]s the company [Telefónica] itself points out, this part [mobile services] of its business became the biggest contributor in terms of the group's profits before interest and tax last year and now accounts for nearly a third of the company's total sales of €28 bn."[14] These high revenues figures are made

[13] Comments of INTUG, *In re Matter of the Effect of Foreign Mobile Termination Rates on U.S. Customers*, FCC IB Docket No. 04-398, Jan. 2005, at 10 [hereinafter Comments of INTUG].

[14] Spain: Telefónica swoons to the Latin beat, Mar. 11, 2004, ebusinessforum.com, *available at* http://www.ebusinessforum.com/index.asp?doc_id=7014&layout=rich.

even more attainable when, as noted in our initial comments, 71.5% of Peru's mobile service operators' revenues are attributed to termination of traffic.[15] With such a profitable regime, Peruvian mobile operators, such as Telefónica Móviles, have no motivation to reduce their mobile termination rates without regulatory intervention.

Moreover, we agree with INTUG, as demonstrated by our situation in Peru, that dominant mobile operators will go to great lengths and engage in any necessary lobbying to impede and delay any changes or initiatives to decrease mobile termination rates. As stated by INTUG, "[d]elay purchased in this way, literally pays dividends to shareholders."[16] Moreover, large mobile operators represent a significant revenue tax and employment base for a country, which allows them to wield a significant amount of political clout and leverage.

It is notable that all the mobile carriers that participated in this proceeding, with the exception of NII Holdings and Sprint, advocated that the Commission should not interfere with mobile termination rates. In addition, we agree with Sprint that opposition by some in the U.S. wireless industry to Commission involvement in the issue of foreign mobile termination may spring from those U.S. carriers that are partly or wholly owned by foreign mobile carriers.[17] Similarly, such opposition may also spring from U.S. carriers that have ownership interests in foreign mobile carriers. In both instances, these U.S. carriers directly or indirectly benefit from the termination revenues inquired by such foreign mobile carriers.

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[15] *See* OSIPTEL, *Documento de Trabajo – Relación de las Llamadas Locales Fijo-Móviles*, Jan. 2004, at 11 [hereinafter *OSIPTEL Study on Fixed-to-Mobile Calls*].

[16] Comments of INTUG, *supra* note 13, at 10.

[17] Comments of Sprint Corporation, *In re The Effect of Foreign mobile Termination Rates on U.S. Customers*, FCC IB Docket No. 04-398, Jan. 14, 2005, at 16.

III. Regional Regulators Are Not Sufficiently Addressing the Problem of High Mobile Termination Rates

Several commenters note that national regulatory authorities are addressing the issue of mobile termination rates and therefore the Commission should allow this issue to be addressed on a national level. However, many regulatory authorities have not shown sufficient inclination to address high mobile termination rates in an efficient manner. Although NII Holdings acknowledges that significant inroads have been made by European regulators in decreasing mobile termination rates, the same cannot be said of many regulators in Latin America.

Telecom Italia notes that European regulators are actively working to reduce mobile termination rates but makes no mention of similar measures being undertaken in Latin America where it has significant investments.[18] In fact, its Peruvian subsidiary, TIM Peru S.A.C., filed a joint letter with Nextel Peru that was submitted to OSIPTEL on September 27, 2004, expressing concerns regarding mobile termination rates in Peru and requesting the imposition of a provisional cap for the termination of calls on the network of the dominant operator (*i.e.* Telefónica Móviles). In the letter, TIM Peru S.A.C. and Nextel Peru noted that dominant operators do not have incentives to reduce their network termination rates and have the ability to engage in practices that do not allow the other operators to compete in the marketplace.

Since 2000, Nextel Peru has been asking OSIPTEL to address the issue of high mobile termination rates; however, the regulator has repeatedly insisted that lower mobile-to-mobile termination rates are not required. In December 2004, OSIPTEL

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[18] Comments of Telecom Italia Group, *In re The Effect of Foreign mobile Termination Rates on U.S. Customers*, FCC IB Docket No. 04-398, Jan. 14, 2005, at 3.

initiated a proceeding to address the issue of high mobile termination rates and has requested mobile operators to submit cost information by February 15, 2005.[19] NII Holdings, however, is very concerned that OSIPTEL will merely accept the cost information provided by mobile carriers such as Telefónica as "true costs" without allowing the other mobile carriers to review and comment on the validity of this cost information.

OSIPTEL has indicated that it will complete its process and set a mobile termination rate by June 2005.[20] OSIPTEL, however, is unwilling to impose a provisional rate that is more in line with the Latin American regional average of 13-14 U.S. cents until its proceeding is completed. Therefore, Nextel Peru will continue to be held "hostage" by the significantly above-cost wholesale termination rates for at least another four months, even if OSIPTEL meet its deadline. As such, NII Holdings requests that the Commission seek assurances from OSIPTEL that it will meet this deadline and request that OSIPTEL impose a provisional wholesale termination rate on all mobile carriers that is more in line with the Latin American regional average of 13-14 U.S. cents.

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[19] OSIPTEL Press Notice, *At the End of January Mobile Operators Should Reduce the Price of Fixed-to-Mobile Calls*, Jan. 6, 2005, *available at* http://www.osiptel.gob.pe/osipteldocs/Temporal%20PDF/Nota%20de%20Prensa-Osiptel-06%20de%20enero12.pdf.

[20] *Id.*

IV. Social Policy Goals are Best Addressed in a Transparent and Non-Discriminatory Manner

Certain mobile carriers assert that the revenues from mobile termination rates are used to satisfy social policy goals that are best considered by national regulators.[21] NII Holdings acknowledges that there are many social benefits that can be derived from mobile services (*e.g.,* universal access to low-income and rural populations). However, such social goals should be conducted in a transparent manner through a universal service fund in which all parties contribute based on a particular formula established by the regulator. Such a fund can be implemented in a competitively neutral manner so that its objectives are met while the overall market is regulated so as to be highly competitive, thus generating benefits for the entire subscriber base. Wholesale termination revenues, however, should not be used to subsidize a competing operator's subscriber base and make their service more attractive at the other operators' expense.

If Telefónica Móviles can offer its subscribers a 3 U.S. cent on-net rate to terminate calls on its network, what is the basis for charging fixed and mobile operators 20.53 to 25 U.S. cents to terminate calls on its network? Is the 17.5 to 22 U.S. cents all being used to promote social goals? Presumably the other countries in the region and other operators are also seeking to presume similar social goals, yet they are able to effectively achieve this through a mobile termination rate that averages 13-14 U.S. cents. In fact, as noted by Table 2 below, the other countries in the region have been able to attain significantly higher mobile penetration rates while having much significantly lower mobile termination rates.

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[21] *See* Comments of BellSouth, *supra* note 1, at 14-18.

Table 2: Comparison of Mobile Service Penetration and Termination Rates in Latin America[22]			
Country	**Population (million)**	**Mobile Penetration per 1000 (2004)**	**Mobile Termination Rate (US cents)**
Argentina	38.87	319.06	8.00
Brazil	179.76	360.15	12.39
Chile	15.90	586.49	11.37
Colombia	42.65	211.22	10.90
Mexico	107.12	346.13	17.50
Peru	29.09	139.02	20.53-25.00
Venezuela	25.20	334.46	15.88

NII Holdings can appreciate that there may be a basis for certain price variation between countries, particularly countries in other regions or that are industrialized countries versus emerging countries. However, we fail to understand how there can be such an enormous disparity between the mobile termination rate in Peru which ranges between 20.53 and 25 U.S. cents versus the mobile termination rate in other similar situated countries such as Argentina (8 U.S. cents), Colombia (10.9 U.S. cents), or Venezuela (15.9 U.S. cents).

V. Conclusion

The issue of high mobile termination rates is one that is going to become increasingly important as the dependence on mobile services continues to grow and the mobile services market becomes more and more concentrated – as is occurring in Latin America. This cash cow for mobile operators requires oversight and regulation because mobile operators have no incentive to impose any decreases in rates. Thus, we welcome the Commission's assistance in reducing mobile termination rates, particularly in Latin America where regulators have been not apt to regulate above-cost mobile termination

[22] EMC World Cellular Database 2005 was used for population and mobile penetration numbers; the mobile termination rate was obtained through materials available on the national regulator's websites.

rates (*i.e.*, Peru) or have allowed increases in termination rates (*i.e.*, Colombia and Nicaragua). Most importantly, NII Holdings requests that the Commission urgently seek assurances from the Peruvian regulatory authority that: (i) it will impose a provisional wholesale termination rate on all mobile carriers that is more in line with the Latin American regional average of 13-14 U.S. cents while it conducts its mobile termination rate proceeding and (ii) it will meet its June 2005 deadline to develop a cost-oriented mobile termination rate.

Respectfully submitted,

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